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Supreme Court, U.S.
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No. 00-906

IN THE
Supreme Court of the United States

COUNTY OF ERIE, PENNSYLVANIA,
Petitioner,

v.

ERIE COUNTY RETIREES ASSOCIATION, *et al.*,
Respondents.

On Petition for a Writ Of Certiorari to the United States Court Of Appeals For The Third Circuit

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

ARGUMENT

1. Respondents do not and cannot dispute that the effects of the decision in the court below reach well beyond the County of Erie, Pennsylvania ("the County"). This case poses issues of national importance affecting virtually every employer that elects to provide health coverage to its retirees, as well as every retiree who enjoys such benefits.

The attention given to and the concern engendered by the court belows decision is not limited to employers and retirees residing within the Third Circuit. As demonstrated by the *amici*, there is great concern that the decision below will cause uncertainty in the administration of health care plans, generate new uncertainty in the application of the ADEA in other employee benefit-related contexts, and may well lead to the unintended consequence of employers reducing or eliminating health care coverage for retirees in general. The seven *amici*—the American Benefits Council, the ERISA Industry Committee, the American Association of Health Plans, Inc., the Blue Cross Blue Shield Association, the Chamber of Commerce of the United States of America, the Health Insurance Association of America, and the Central States, Southeast and Southwest Areas Health and Welfare Fund—represent a broad array of interests. Taken together, these *amici* represent the interests of large employers maintaining ERISA-covered pension plans; more than 1,000 managed health care organizations serving nearly 140 million Americans; over 140,000 businesses and organizations of every size and in every economic sector and geographic region of the country; 47 independent, locally operated Blue Cross and Blue Shield Plans; and more than 290 private, market-based health insurance providers. The concerns

expressed by these *amici* provide strong reasons for granting *certiorari*.

Moreover, the court below's decision also is being used by the Equal Employment Opportunity Commission ("EEOC") as support for a nationwide enforcement effort based on the principle that "there is no provision in the ADEA permitting an employer to treat retirees differently with respect to health benefits based on Medicare eligibility" other than the equal cost or equal benefit defense. EEOC Compliance Manual No. 915.003 at ch. 3, § IV.B (Oct. 3, 2000). Indeed, Respondents even cite to the EEOC's Compliance Manual—which first announced the proposition quoted above *after* the court below's decision—as support for the proposition that the EEOC "has interpreted the ADEA in a manner which is entirely consistent with the decision of the court of appeals below." (Opp. at 9.) Respondents, however, fail to resolve the inconsistency between the EEOC's present view and its previous pronouncement that "[r]etirees are not embraced by the term employee" in connection with a now-repealed provision of the Tax Equity and Fiscal Responsibility Act ("TEFRA") of 1982, Pub. L. 97-248, 96 Stat. 324 (1982). (*See* Pet. at 12-13.)

2. Respondents'statement that the court belows decision is "entirely consistent with all the prior case law with the sole exception of the decision of the district court in this case" overstates the extent to which the Question Presented in the Petition has been addressed by the federal courts. In fact, almost all of Respondents' cases are easily distinguishable from the case at bar. For example, the benefit plans involved in *Milwaukee Professional Fire Fighters v. City of Milwaukee*, 869 F. Supp. 633 (E.D. Wis.1994), did not involve specifically the administration of retiree health benefits, and thus the district court in that case did not have any occasion to consider the special policy considerations or the legislative history at issue here. Moreover, the benefit

plans at issue in *Milwaukee* involved benefit schemes whose allegedly discriminatory provisions (i) were in place while the individuals were still active employees, and (ii) provided disincentives for the individuals to remain in the active work force, because they penalized the retirees for having worked to an older age. The district court in the instant case found that the plans in *Milwaukee* were thus very much like the type of plans at issue in *Ohio Public Employees Retirement System v. Betts*, 492 U.S. 158 (1989), and reasoned that it was clear that the *Milwaukee* plaintiffs were advancing the types of claims intended to be within the scope of the OWBPA's protection, unlike Respondents' claims.

Although the facts in *McKeever v. Ironworker's District Council*, No. Civ. A. 96-5858, 1997 WL 109569 (E.D. Pa. Mar. 7, 1997), bear some similarity to the facts of this case, as the district court in this case found, there are ample reasons why that decision should not be followed. Specifically, that decision makes no mention whatsoever of the legislative and administrative history of the OWBPA, and the *McKeever* court did not acknowledge or attempt to reconcile its holding with the provisions of § 623(l)(2)(D), which implicitly sanction retiree health plans that provide different benefits depending on eligibility for Medicare. (App. at 88a.)

The remainder of Respondents' cases—*EEOC v. Cosmair, Inc.*, 821 F.2d 1085 (5th Cir. 1987); *Passer v. American Chemical Society*, 935 F.2d 322 (D.C. Cir. 1991); and *Caudill v. Farmland Indus., Inc.*, 698 F. Supp. 1476 (W.D. Mo. 1988)—provide no guidance as to whether the ADEA applies to retiree health benefits. None of these cases involved retirees or health benefits. Rather, all of these cases merely held that a retaliation claim could be brought by former employees. As Petitioner pointed out, while a broad reading of "employee" may have been appropriate to effectuate the purpose of anti-retaliation laws, as to the provision of health benefits, such a reading is not consistent with the express

purposes of the ADEA. (*See* Pet. at 8.) Thus, Respondents' argument that *certiorari* should not be granted because the decision below is "entirely consistent with all the prior case law" is both an overstatement of the case law and an oversimplification of the issues involved in the Question Presented.

3. Respondents contend that, because the case has been remanded to the district court to determine whether the County can satisfy the ADEA's safe harbor provision, it is premature to grant *certiorari*. Such an argument misses the point. The proceedings on remand would involve the factual determination of whether the County can satisfy the equal cost or equal benefit safe harbor. These proceedings will not, indeed could not, resolve the Question Presented. If, as Petitioner argues, the ADEA does not apply to retiree health benefits, the remand in the district court would be unnecessary and have no purpose because it would be founded upon an incorrect interpretation of the ADEA. If the County loses the remand, the County would petition the Court for review of the same Question Presented. Indeed, as pled by the Respondent, the County would lose on remand because there is no way for the County to satisfy the "equal cost or equal benefit" safe harbor provisions of the ADEA. (*See* Opp. at 6.)

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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